IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 390/2005

Shri Bapu Shabi Gadekar,
married, agriculturist, residing of
Oshalbag, Dhargal, Pernem, Goa. ..... Petitioner.

V/s.

1) Shri Ankush Vishhu Patekar,
son of late Vishnu Patekar,
aged about 45 years,
married, maison;

2) Yeshwant Dhundu Patekar,
son of late Dhondu Patgekar,
aged about 50 years, married,
agriculturist,

3) Tukaram Babli Amerkar,
son of Babli Amerkar, aged about 50 years,
married, maison;

4) Shri Mangesh Raghunath Godkar,
son of Raghjunath Godkar, aged
about 40 years, married, maison;

5) Dhondu Sakharam Patekar, son of
Sakharam Patekar, aged about
30 years, married,
a retail shop owner;

6) Shri Keshav Narayan Konadkar,
son of Narayan Konadkar,
aged about 55 years, married,
agriculturist,

All residing at
Oshalbag, Dhargal, Pernem, Goa.

7) Smt. Saulo Gopal Naroji,

8) Shri Vilas Saulo Naroji;

9) Mrs. Vilas Saulo Naroji;

All residents of Oshalbag,
Dhargal, Pernem, Goa.

10)Shri Gopal Saulo Naroji;
11)Mrs. Gopal Saulo Naroji;
12)Shri Chandrakant Saulo Naroji;
13)Mrs. Chadrakant Saulo Naroji;

All residents of C/o. Shri Vilas Saulo
Naroji; Oshalbag,
Dhargal, Pernem, Goa.

14)Bhaguirathi Bapu Naroji;
15)Bharat Bapu Naroji;
16)Geeta Bharat Naroji;
17)Sudan Bapu Naroji
18)Sonali Sudan Naroji;
19)Ashok Bapu Naroji;
20)Ashwini Bapu Naroji;
21)Suman Bapu Naroji;

All residents of
Oshalbag, Dhargal, Pernem, Goa.

22)Shahadeo Vishram Naroji,
son of Vishram Naroji,
aged about 45 years,
married, maison,
resident of Oshalbag,
Dhargal, Pernem, Goa.

23)Chandrvati Kashinath Patekar,

24)Premnath Kashinath Patekar,
25)Ranganath Kashinath Patekar,
26)Anand Kashinath Patekar,

All residents of Oshalbag,
Dhargal, Pernem, Goa.

27)Smt. Sumitra Suryakant Patekar,
28)Shri Sagar Suryakant Patekar,
29)Shri Sarvesh Suryakant Patekar,
30)Shri Sachit Suryakant Patekar,
31)Shri Swapin Suryakant Patekar,

All residents of Oshalbag, Dhargal,
Pernem, Goa. ..... Respondents.

Mr. D.J. Pangam, Advocate for the petitioners.

Respondents though served – absent.

CORAM : A.P. LAVANDE, J.

DATE : 17TH MARCH, 2006.

ORAL JUDGMENT :

Heard Mr. Pangam, the learned Counsel for the petitioners. Rule. The respondents though served have chosen not to put in appearance. Having regard to the relief sought, it is considered necessary to dispose of the petition forthwith.

2. The petitioner is one of the legal representatives of the original plaintiff in Regular Civil Suit No. 522/1988 filed by one Shabi Gadekar in the Court of the Civil Judge, Junior Division, at Pernem against the respondents. The suit was filed on 30.12.1988. The defendants in the said suit claimed tenancy and since the tenancy issue was pending before the Mamlatdar for adjudication, the said suit was kept sine die on 22.6.93. On 28.2.05, the LRs. of the original plaintiff appeared before the Court pursuant to the notice issued to the deceased plaintiff. On 18.3.05, the LRs. of the deceased plaintiff filed two applications, one for condonation of delay and the other for

bringing LRs. of the plaintiff as well as deceased defendants on record. The trial Court, after hearing the other side, dismissed both the applications by common order dated 24.3.05 mainly on the ground that the LRs of the deceased were not brought on record within 90 days.

3. Mr. Pangam, learned Counsel appearing on behalf of the petitioner submitted that the trial Court has exercised the jurisdiction illegally while passing the impugned order. According to the petitioner, the matter was looked after by the original plaintiff and the LRs. of the plaintiff were not aware of the development in the matter. According to Mr. Pangam, in the proceedings before the Mamlatdar, all the legal representatives of the deceased were brought on record, in time. Therefore, according to the learned Counsel, the trial Court ought to have set aside the abatement, condoned the delay and allowed the application for bringing the LRs. on record. Placing reliance on the Judgment of the Apex Court in the case of **Mithailal Dalsangar Singh and ors.** v. A**nnabai Devram Kini and others**, (2003) 10 SCC 691, the learned Counsel submitted that the trial Court ought to have taken a liberal view while dealing with the applications filed by the LRs. of the original plaintiff.

4. I have considered the submissions made by the learned Counsel for the petitioner. I have perused the records. I find

considerable merit in the submission made by Mr. Pangam that the trial Court completely misdirected itself in law in holding that since the LRs. of the deceased plaintiff and the deceased were not brought on record within 90 days, the delay could not be condoned. The learned Counsel is justified in placing reliance on the Judgment of the Apex Court in **Mithailal Dalsangar Singh's case** (supra). It will be useful to reproduce the paras 8 and 9 in Mithailal Dalsangar Singh's case. They read as under :

> "8. Inasmuch as the abatement result in denial of hearing on merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the

> suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on record, if allowed, would have the effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for.
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> 9. The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of "sufficient cause" within the meaning of sub-rule (2) of Rule 9 of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interfered with by superior jurisdiction."

5. Having regard to the principles laid down by the Apex Court in **Mithailal Dalsangar Singh's** case, it is difficult to sustain the

order passed by the trial Court. An application filed by a party in a suit for setting aside abatement, condonation of delay and bringing LRs on record has to be liberally construed. In the present case, the delay is neither intentional nor deliberate. In my opinion, there was sufficient cause for setting side the abatement and also for condoning the delay in bringing on record the LRs. of the deceased plaintiff.

6. In the light of the above discussion, the impugned order dated 24.3.05 is, hereby, quashed and set aside. The applications dated 18.3.05, filed by the legal representative of original plaintiff before the trial Court are allowed. Rule is made absolute in the aforesaid terms. The petitioner to carry out the amendment to the cause title in Regular Civil Suit No.522/88 within a period of two weeks from the date of receipt of writ of this Court by the trial Court. No order as to costs.

A.P. LAVANDE, J.

ssm.